IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-501

SHERWIN S. STERN,

Petitioner,

vs.

UNITED STATES GYPSUM, INC., CHARLES E. DYKES, WILLIAM R. HOGAN, AND THOMAS HEFFERNAN,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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STATEMENT OF THE CASE.

Beginning sometime in 1972, Mr. Sherwin S. Stern was in charge of auditing the United States Gypsum Co. During the course of that audit, Respondents caused a complaint to be lodged with Mr. Stern's superiors.[1] After an independent IRS

1. Among other things the Complaint alleged:

[Attorneys for United States Gypsum] delivered to the IRS inspectors a memorandum which purported to be a summary of the December 14, 1972 meeting prepared by Defendant Dykes on December 18, 1972. This memorandum attributed to Plaintiff Stern the same improper and unprofessional conduct described in paragraphs eleven (a), (c), and (d) above. In

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investigation and hearing procedure, action was taken by the Government which allegedly injured Mr. Stern's status as an employee. Mr. Stern then brought a *federal* defamation action against the complaining taxpayer alleging all his injuries were suffered because the complaints were false and inspired by the allegedly malicious hope of interfering with the audit.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

Mr. Stern is the first federal employee who has ever attempted invoking, in the context of a defamation claim, the protection of the Ku Klux Klan Act,[2] an act whose general purpose, ironically, was to protect the *citizen* from violations of *their* individual rights. That circumstance certainly belies the assertion that the consequences of the Seventh Circuit's decision are "profound".[3] Nor does the case bode ill for the future of Civil Service:

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pertinent part, the memorandum provided that Plaintiff Stern had spoken at the December 14, 1972, meeting as follows:

> "It is our plan to take these matters up with the F. T. C., the Justice Department and the Appellate Division. We would plan to do a complete audit on this entire area including extensive investigation and interviews with third parties. To do this would take many weeks and run us well into 1973 instead of finishing up on 12/31/72 as planned. This would also expose you to extensive investigation by the F. T. C. and the Justice Department. However, if you would agree to accept an assessment, we could keep this entire matter within the I.R.S. and save both you and ourselves a lot of time and effort. After you make your decision, if it's to agree on an assessment, we will set the ground rules and decide on the amount. It will be [a substantial amount] . . ." [Complaint ¶ 11(i).]

2. "This [case] presents questions of first impression in the construction of 42 U. S. C. § 1985(1)." *Stern* v. *United States Gypsum, Inc.*, 547 F. 2d 1329, 1331 (7th Cir. 1977); App. to Pet. 1a.

3. As Mr. Stern implicitly concedes, there is no conflict between Circuits; to the contrary, two other Courts of Appeals have reached

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> We are not unmindful that a counter-argument could be advanced to the effect that the possibility of no federal statutory protection of a government agent in the circumstances alleged in Stern's complaint might very well chill entry into government service. Aside from the fact that we are unaware of any lack of applicants for non-policy governmental positions despite the lack of any such federal statutory protection heretofore, we note that when charges of misconduct are made through official channels, as was the case here, the protective machinery of due process hearings is available, with full oportunity to refute that which is unfounded. [*Stern* v. *United States Gypsum, Inc.*, 547 F. 2d 1329, 1344 (7th Cir. 1977); App to Pet. 25a.]

THE SEVENTH CIRCUIT FAITHFULLY ADHERED TO THIS COURT'S RULINGS BY INTERPRETING 42 U. S. C. § 1985 TO AVOID A SUBSTANTIAL RESTRICTION OF RESPONDENTS' CONSTITUTIONAL RIGHTS.

Assuming *arguendo*—as Mr. Stern apparently does by ignoring the question—that no Article III infirmity exists barring federal jurisdiction over this claim, *See* discussion *post* at 5, there are several reasons why the Ku Klux Klan Act should not be construed as authorizing a lawsuit on these facts.

The most obvious of these is the one recognized by the Seventh Circuit, that there was a danger of impinging upon the Right to Petition for Redress of Grievances,[4] which, applying the rule of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), led to the con-

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results like the Seventh Circuit's in cases balancing the Right to Petition against policies of the antitrust laws, *Taylor Drug Stores, Inc.* v. *Associated Dry Goods Corp.*, ... F. 2d ....., 46 U. S. L. W. 2104 (6th Cir. August 12, 1977); and *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Bd.*, 542 F. 2d 1076 (9th Cir. 1976), *cert. denied*, ... U. S. ....., 51 L. Ed. 2d 787 (1977); *cf.* Supreme Court Rule 19.

4. See, *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U. S. 217, 222-23 (1967).

struction it gave to the Act: "[A] § 1985(1) complaint is insufficient to state an actionable federal claim insofar as it only alleges injury resulting from complaints about the plaintiff officer's official performance lodged by the defendants with the officer's superiors." 547 F. 2d at 1344, App. to Pet. 25a-26a.

Mr. Stern does not allege—nor, to his credit, has he suggested that, in good faith, he could allege—Defendants did anything but cause complaints about Mr. Stern's conduct to be made to his IRS superiors, by "open straight-forward petition lodged through what the parties agreed to be the proper and established channels. *See,* 8 CCH 1977 Stand. Fed. Tax. Rep. ¶¶ 5983 at 67,012, 67,114-15, 5985 at 67,146." 547 F. 2d at 1343, App. to Pet. 24a. Even if there were *any* merit (which we do not acknowledge, but will not argue in detail here) to Mr. Stern's belabored argument, that the Right to Petition for Redress of Grievances is subject to the identical limitations which may be found to the Freedom of Speech, there is certainly a great deal to be said for the contrary proposition, that an absolute privilege[5] accompanies the proper lodging of petitions. And much of it was said by the Court of Appeals in this case.

That being so, the Seventh Circuit did precisely what this Court has always done—it construed the statute to *avoid* the Constitutionally questionable interpretation. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961).

Which leads to the last of the issues touched upon by Mr. Stern—the construction of 42 U. S. C. § 1985(1), when viewed in light of the legislative history behind the Klu Klux Klan Act, *see* discussion *post* at 7. For the only time

5. After all, why specifically protect the Right to Petition if it is to be deemed identical to the Freedom of Speech? *See, Marbury* v. *Madison,* 1 Cranch (5 U. S.) 137, 174 (1803), "It cannot be presumed that any clause in the Constitution is intended to be without effect." Nor could it be expected that a danger to good order would be created by lodging a petition headlined "Fire!"; *cf., Schenck* v. *United States,* 249 U. S. 47 (1919).

the *Noerr* avoidance-by-construction rule would not apply is when statutory language, combined with legislative history, makes it clear Congress intended the questionable interpretation —in which case the courts must squarely face the Constitutional issue.

Here, however, "the legislative history lacks any specific indications of such an intention" "to invade the right to petition." 547 F. 2d at 1344, App. to Pet. 25a.

ARTICLE III OF THE CONSTITUTION DOES NOT AUTHORIZE FEDERAL JURISDICTION OF MR. STERN'S CLAIM.

Mr. Stern's Petition for Certiorari relies upon a provision of the Ku Klux Klan Act, now in part, 42 U. S. C. § 1985(1).[6] His theory of federal jurisdiction seems, at first, clear from the Petition—proper functioning of the federal government is impaired when its executive officers are injured in their person or property on account of their performing official duties, and thereby impaired in their ability to discharge those duties. But it is a long way from establishing that proposition—which, of course, cannot seriously be doubted in the context of real resistance to federal law enforcement[7]—to sustaining the novel proposition that federal courts should take jurisdiction of Mr. Stern's own, private defamation claim.

First it must be shown that Article III of the Constitution authorizes exercise of the Judicial Powers. It is axiomatic that Congress cannot create federal jurisdiction; thus, for example, the apparent "grant" of jurisdiction in 28 U. S. C. § 1343(1) is, in fact, a "non-limitation" whose *maximum* breadth is that of the Constitutional grant in Article III.

6. Presumably, Mr. Stern further relies on 28 U. S. C. §§ 1331 (a), 1343(1), (2) and (4), as suggested by the Court of Appeals. 547 F. 2d at 1332, App. to Pet. 2a.

7. Thus, there is no question that causing such injury is properly made a federal offense, 18 U. S. C. § 372. That statute, of course, could not be applied to the sort of facts alleged in this case.

We submit this aspect of the jurisdictional question is not an easy one which can be simply neglected, as Mr. Stern's Petition does. The only grant of Judicial Power Mr. Stern could rely upon is "to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States. . ." Article III, § 2.

There is no "right" to federal employment—either under the Constitution or any Law of the United States, *Jason* v. *Summerfield*, 214 F. 2d 273, 277 (D. C. Cir.), *cert. denied*, 348 U. S. 840 (1954), nor is there any federal right—by Constitution or any other Law—to be free from tortious injury, those rights having always been secured by state (common) law. Thus, in 42 U. S. C. § 1985(3), Congress was attempting to convert a right not found in either the Constitution or Laws of the United States—automatically—into a federal right.

It is necessarily fundamental that Congress may not bootstrap federal jurisdiction; if it could not grant federal jurisdiction over tort cases, it cannot do so indirectly just by saying, "from now on, torts against [whomever] arise under United States Law." Instead, an enumerated Congressional power must (at least indirectly) authorize that Act. None of the powers of Congress set out in Article I, § 8 of the Constitution provide a basis for such legislation. The "inherent" right of self-protection is accommodated by the criminal provision, 18 U. S. C. § 372. The only other conceivable source of Congressional authority for this legislation is contained in § 5 of the Fourteenth Amendment. But Mr. Stern has never asserted (i) the rights he wishes vindicated are founded in the Fourteenth Amendment, or (ii) he was enforcing the Fourteenth Amendment when he suffered the alleged "injuries."[8]

8. We do not quarrel with the Constitutionality, *per se*, of 42 U. S. C. § 1985(1), only with its application in this context. The enacting Congress was concerned with enforcing the Fourteenth Amendment in the South, and federal officers involved in that and related endeavors clearly stand in different circumstances.

Congress, therefore, lacked authority to "grant" Mr. Stern a federal cause of action for a tortious injury to his person or property; and, accordingly, the Courts lack jurisdiction. Mr. Stern's Petition neglects to address this fundamental problem.

LEGISLATIVE HISTORY DOES NOT SUPPORT PETITIONER'S INTERPRETATION OF THE KU KLUX KLAN ACT.

The Seventh Circuit acknowledged it "is indisputable" "that 'the circumstances alleged by Stern are simply of a whole different world from that addressed by the 42nd Congress.'" 547 F. 2d at 1334, App. to Pet. 7a. Thus, not only was the *Noerr* doctrine appropriately applied in this case, but the decision could have been based *solely* on the principle that "courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *United States* v. *Union Pacific R. R.*, 91 U. S. 72, 79 (1875).

Since the "injury" Mr. Stern allegedly suffered had not the slightest similarity to the sorts of injuries which Congress meant to deter, the word "injury", as used by the 42nd Congress, should not now—more than 100 years later—be read to precipitate a result never anticipated by its enactors. "It would, in fact, surprise us if any member of that Congress ever specifically contemplated the application of the provision which became § 1985(1) to conspiracy to defame and discredit a revenue officer to his superiors." 547 F. 2d at 1335, App. to Pet. 8a.

We presented three basic, though related, bases for construing 42 U. S. C. § 1985(1) as not intended to support Mr. Stern's lawsuit. First, the 42nd Congress intended to permit actions only for violence-related torts; *i.e.*, the "force intimidation, or threat" concept with which the statute begins. Second, the 42nd Congress intended the section to benefit only federal personnel actually enforcing, or intimately connected with enforcing, the Fourteenth Amendment. *See* discussion *ante* at 5. Third, the 42nd Congress intended federal lawsuits under this

section to be directed only at conspiracies motivated by an "invidiously discriminatory animus." *See, Griffin* v. *Breckenridge,* 403 U. S. 88 (1971). In light of its result, we do not believe the Seventh Circuit was required to consider these issues;[9] however, having done so, we believe the court's rejection of our arguments was unwarranted.

Before concluding, it is perhaps appropriate to comment on Mr. Stern's alarmist argument that the United States Gypsum Company has been granted a license to spread the Big Lie. Whatever else may be said about the argument—which pervades Mr. Stern's Petition—it suffices for our purposes to point out that it does not speak to the facts of this case. What *is* involved is the lodging of *a* complaint[10] through an established channel. The issue Mr. Stern *appears* to argue is not the one he *really* argues. While appearing to argue danger to the Government's efficiency, he is really talking about his own personal injury. When examining the equities on the two sides of this case, it must be remembered, after all, there is only so much harm that any given taxpayer can do to the Government by lodging complaints with the Government.

The Seventh Circuit saw that the circumstances of this case do not pose the sort of clear and present dangers that would justify infringement of Constitutional rights:

> . . . Stern's complaint makes it clear that the defendants genuinely sought governmental response to their charges, either by generating internal IRS pressure on Stern to act more professionally, or by having Stern removed from the USG audit. Just as in *Noerr,* the fact of defendants' success in obtaining what they sought further attests to the genuineness of the endeavor. Moreover, the possibility of inferring a "mere sham" here is even less than it was in *Noerr;* there

9. On the other hand, in order to grant the relief ultimately sought by Mr. Stern's Petition for Certiorari, this Court *would* have to resolve those issues—among others.

10. While the Complaint does allege more than one communication to Mr. Stern's superiors (not always on Respondents' initiative, however), the substantive Complaint was always the same.

at least, direct if incidental injury to the plaintiffs' business relationships could well have resulted even if the defendants' publicity campaign had had absolutely no governmental impact. Here, in contrast, Stern's injuries resulted solely and directly from the defendants' charges' impact within the IRS. In this regard, we think it is significant that the defendants made their complaint to the very body concerned with whether a governmental employee was misusing the considerable power available to him. Compare this statement in *City of Madison, Joint School District No. 8* v. *Wisconsin Employment Relations Commission,* ..... U. S. ..... 45 U. S. L. W. 4043, 4045 n. 10 (December 8, 1976): "It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate those views directly to the very decision making body charged by law with making the choices raised by the contract renewal demands." We simply are not persuaded that Congress intended the language of § 1985(1) to curtail this type of redress-seeking under any circumstances. [547 F. 2d at 1345, App. to Pet. 27a.]

In short, the United States Gypsum Company had a grievance about its treatment by a Government official as he purported to perform the functions of office.[11] The Company and its officers petitioned for redress of that grievance—which was essentially that the Company was being denied due process of law in the conduct of the IRS audit; that Mr. Stern's conduct was such that the basic fairness due taxpayers in dealings with the IRS was lacking.[12]

One thing the lessons of modern history *do* teach is that there must be ways and means available for questioning the conduct of Government officials. It is one thing for Government to

11. *See* note 1, *supra.*

12. Malicious intent was of the essence of the common law of fomenting or stirring up litigation. [footnote omitted] And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious. [*NAACP* v. *Button,* 371 U. S. 415, 439-40 (1963).]

operate efficiently, but it must also not be allowed to become an unfettered machine which is neither responsive nor responsible to those it governs. Mr. Stern cannot be voted out of office, and he cannot be impeached. He is subject only to removal by his superiors for cause; therefore, there must be an open channel for communication to them. *That* on balance of the interests on the two sides of this case's coin, is what will more effectively preserve the integrity of the Government and its responsibility to the people.[13]

CONCLUSION.

For the reasons stated above, Respondents pray this Honorable Court will deny the Petition for Certiorari filed by Mr. Stern.

Respectfully submitted,

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13. *Compare* the absolute privilege afforded Petitions for Redress of Grievances lodged with the judicial branch of Government.